

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**NORTHERN ROUTES
TRANSPORTATION, INC.,**

Debtor.

Case No. **05-60368-11**

O R D E R

At Butte in said District this 5th day of April, 2005.

In this Chapter 11 bankruptcy, the Debtor filed a “Motion . . . to Pay Its Prepetition Wages, Employee Benefit[s], Payroll Taxes and Contract Drivers” and a “Motion . . . to Pay Its Prepetition Fuel Contract[s] and Cell Telephone Service Contracts” on February 22, 2005; the same date that Debtor filed its voluntary Chapter 11 bankruptcy petition. Debtor asserts that the services of its drivers, employees and 7 identified vendors is critical and is necessary for the day to day operations of Debtor and that it is essential that Debtor maintain its business operations pending the formulation and submission of a Chapter 11 Plan.

Upon shortened notice, the Court held a preliminary hearing on the above motions on February 22, 2005. Following the February 22, 2005, hearing, the Court entered an interim Order temporarily authorizing Debtor to pay prepetition debt owing to Verizonwireless, Comdata Transportation Services, Concord EFS Transport Services, Pilot Travel Centers, LLC, PetroCard, Transfunds-IPS and Tesoro Petroleum Co., Inc. The Court also approved, on an interim basis, Debtors’ request to pay its drivers and other employees their prepetition wages. In the same Order, the Court scheduled a final hearing on the above matters for March 8, 2005.

On March 2, 2005, prior to the March 8, 2005, hearing, Debtor and the United States Trustee, acting through her counsel, Neal G. Jensen, Assistant United States Trustee (“UST”), filed a Motion to Approve Stipulation Regarding Resolution of Issues Surrounding Doctrine of Necessity. The foregoing motion was accompanied by a “Stipulation between Debtor and United States Trustee Regarding Resolution of Issues Surrounding Doctrine of Necessity.” The Court granted the parties’ joint motion and approved the Stipulation. Pursuant to the Stipulation and because of the varying degree of proof required by courts that have adopted the Doctrine of Necessity, which the parties acknowledge “can place substantial burdens on debtors to make an adequate record”, the parties request that the Court rule on “whether the ‘bright line rule’ of [*In re*] *Timberhouse [Post and Beam, Ltd.*, 196 B.R. 547, 15 Mont. B.R. 317 (Bankr D.Mont. 1996)] and [*Matter of*] *B & W Enterprises, Inc.*, [713 F.2d 534 (9th Cir. 1983)] still prevails in the District of Montana, and if not, what kinds of guidelines or tests the Court would deem appropriate to impose for a debtor to establish the necessity of paying certain prepetition creditors deemed to be critical to its ongoing business.”

Both Debtor and the UST have briefed the issue and the matter is ready for decision. Debtor argues that this Court has authority under 11 U.S.C. § 105 to authorize Debtor to pay its critical vendors under the Doctrine of Necessity. Debtor relies on 11 U.S.C. § 507 for authority to pay its drivers and employees, arguing that in “every case, the amount to be paid is less than [\$4,925] which is the amount entitled to priority under § 507. The Debtor is not aware of any circumstances by which an employee would be owed more than this priority amount.”

In *Timberhouse*, this Court adopted “the bright line rule set forth in *B & W Enterprises, White Beauty View* [70 B.R. 90 (Bankr. M.D.Pa. 1987)] and *J.L.T. Inc.*, [36 B.R. 860 (Bankr. E.D.Mo. 1984),] *supra*, that a prepetition unsecured claim cannot be elevated to an

administrative expense since the scheme of the 1978 Bankruptcy Code does not allow this Court to change the classification of claims set by Congress in the Code. *Timberhouse*, 15 Mont. B.R. at 322. Relying on *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004), and other cases, Debtor argues that this Court should abandon the bright line rule articulated in *Timberhouse* and instead adopt the equitable doctrine of necessity which was discussed in dicta in *Kmart*, 359 F.3d 866.

After reviewing the applicable law, the Court declines to abandon its prior ruling in *Timberhouse*. Section 507 of Title 11 specifically sets forth the manner in which prepetition claims are to be paid, including the claims of Debtor's drivers and employees, which appear to have third tier priority under § 507(a)(3). The Court's ruling furthers one of the long-standing principals of the Bankruptcy Code-- equality of treatment of unsecured creditors.

IT IS THEREFORE ORDERED that the bright line rule articulated by this Court in *In re Timberhouse Post and Beam, Ltd*, 196 B.R. 547, 15 Mont. B.R. 317 (Bankr. D. Mont. 1996), is the prevailing law in the District of Montana; and thus, Debtor's "Motion . . . to Pay Its Prepetition Wages, Employee Benefit[s], Payroll Taxes and Contract Drivers" and a "Motion . . . to Pay Its Prepetition Fuel Contract[s] and Cell Telephone Service Contracts" filed February 22, 2005, are DENIED.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana